ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

5 Sections This Edition
Cases Per Section 1-8

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Dismissals	100%
Trials	100%
Appeals	100%
Settlements	100%

New Lawsuits Filed

A Fable About Fiber?

Cheah v. Pepperidge Farm Inc., No. 2:22-cv-03633 (E.D.N.Y. Jun. 20, 2022).

Readers, grab your charcuterie and guard your cheese boards! The crusader against crackers, Spencer Sheehan & Co., is at it again. In a new lawsuit filed in the Eastern District of New York, a plaintiff represented by Sheehan contends that a large bread manufacturer misleads consumers about the whole grain content in its popular "Harvest Wheat" crackers.

According to the complaint, the terms "multigrain" and "wheat" are synonymous with whole grains; therefore, (in classic Sheehan fashion) the plaintiff contends that the wheat crackers must contain almost all whole grains. If you can brie-lieve it, the wheat snacks commonly used with everyone's favorite salty blue are allegedly mostly refined grains, with hardly any whole grains and fiber. According to the complaint, the representation as "Harvest Wheat" causes consumers to expect the crackers to contain a predominant amount of whole grains compared with refined grains. But the complaint contends that the crackers are primarily made of white flour, darkened with molasses and honey, and are bereft of the many health benefits consumers expect from enriched wheat flour, including fiber, of which the product only contains one gram per serving (as disclosed on the nutrition panel).

According to the plaintiff, these "misrepresentations" give rise to claims for violations of state consumer protection laws, breaches of warranty, negligent misrepresentation, fraud, and unjust enrichment. The plaintiff seeks to represent a class of New York consumers and a multistate class of plaintiffs in Kansas, New Hampshire, Nebraska, Virginia, South Carolina, Montana, Iowa, Mississippi, and Utah.

The Good, The Bad, and The Saturated Fat?

Ryan v. The Good Fat Co. Ltd., No. 3:22-cv-03391 (N.D. Cal. Jun. 8, 2022).

Don't eat carbs! Don't eat red meat! Eat lots of meat! Count your calories, count your points, count your macros! There are so many fad diets and so much conflicting health advice out there that it's impossible to know what's good for you and what's not. But according to a pair of California consumers, it shouldn't be that tough to figure out that a bar being advertised as healthy *probably* shouldn't contain as much saturated fat as *two* large servings of fast food fries or a large slice of pepperoni pizza! But according to a recent complaint, the manufacturer of a line of health bars did exactly that. And according to the complaint, the defendant engaged in a deceptive marketing campaign to convince consumers the products were nutritious and healthful to consume.

The complaint alleges that the defendant went beyond just the "GOOD FATS" representations on the bars' labels and perpetuated messages that its products were healthy to consume and a better alternative to the competition. The complaint describes a web of deceptive acts, including through statements and pictures on social media, and the hiring of a "Scientific Advisor" to "increase the credibility of its 'healthy' image" despite that person not holding any scientific degrees.

While the plaintiffs here may have been cutting calories in an attempt to slim down, they certainly didn't skimp in putting some real meat to their complaint. While we've covered our share of empty ice cream cones when it comes to complaints, the defendant here faces a real uphill climb at the motion to dismiss stage. Hopefully they've been getting their steps in. These plaintiffs seek to represent a nationwide class, a multistate consumer class, and a California subclass and are pursuing claims for violations of state consumer protection laws and unjust enrichment in their bid to recover damages and obtain injunctive relief.

Deceitfully Creamy

English v. Danone North America Public Benefit Corp., No. 7:22-cv-05105 (S.D.N.Y. Jun. 17, 2022).

If you're looking for Spencer Sheehan to give you seven definitions of "cream," then you've come to the right place! Everything's bigger in Texas, and that includes the alleged scandal at the heart of this consumer fraud lawsuit filed in New York federal court. A Texas woman alleged that she was induced to purchase French-vanilla-flavored coffee creamer because she believed and expected the product contained cream, a dairy ingredient, but instead was sold creamer that contains only trace amounts of dairy. According to the complaint, consumers value products with cream from dairy ingredients "for its nutritive purposes." The plaintiff claims that she, and a class of similarly situated individuals, were convinced that they were buying real, dairy-based cream because of the labeling statement identifying the product as a "Coffee Creamer," which she alleges is almost identical to "coffee cream," a term defined by the FDA as a dairy product. The complaint also brings claims for breaches of warranty (espresso and implied) and violations of state consumer protection statutes, but you'll have to pour-over this complaint yourself for the details. (We suggest something strong.)

A Good Old-Fashioned Fish Tale

Gabrielian v. Nordic Naturals Inc., No. 2:22-cv-04463 (C.D. Cal. Jun. 29, 2022).

Something's fishy at this industry-leading supplement company, and this plaintiff intends to catch it in his net. A California-based plaintiff brings claims on behalf of himself and a class of consumers alleging that the defendant's practice of selling "Ultimate Omega 2X" fish oil supplements deceives consumers hook, line, and sinker into believing that the product has twice the amount of Omega-3 servings as the defendant's regular "Ultimate Omega" fish oil supplements. Actually, according to the plaintiff, the product only contains about 80% more Omega-3s, not twice the amount. But who among us hasn't exaggerated the size of a fish?

The complaint asserts claims for violations of California consumer protection statutes, as well as claims for breaches of express and implied warranty. The complaint will surely face a motion to dismiss, and we'll be sure to monitor whether this defendant is able to slip off the hook for its allegedly deceptive labeling practices.

Consumers Peeved About Peanut Butter

Bopp v. The J.M. Smucker Co., No. 2:22-cv-01812 (D.S.C. Jun. 8, 2022).

A putative class action filed in South Carolina federal court accuses a leading peanut butter producer of falsely advertising its peanut butter products as safe for human consumption when, in fact, they allegedly cause illnesses stemming from Salmonella contamination. The plaintiff alleges that when consumers purchase the company's peanut butter products—which are advertised as high quality—they expect they are getting safe and healthy peanut butter. But according to the complaint, many of the defendant's peanut butter products were contaminated with Salmonella and recalled as a result. Based on these allegations, the complaint asserts putative class claims for negligence, breach of warranties, fraudulent concealment, and unjust enrichment. The plaintiff prays for compensatory and punitive damages, injunctive relief, and attorneys' fees and costs.

Consumer Shook Up over Fizzy Drink Ingredients

Tatum v. Talking Rain Beverage Co., No. 3:22-cv-03525 (N.D. Cal. Jun. 15, 2022).

It's hot out there, folks. But before you reach for a flavored sparkling water to quench your parched palate, a plaintiff in a new lawsuit urges you to dig further into the ingredients of a major fizzy water product. According to the putative class action complaint, the defendant uses an artificial form of malic acid to flavor its carbonated concoctions, yet it markets its product as being derived from natural sources.

Naturally, the use of malic acid means the absence of natural flavoring, right? Not necessarily! As the plaintiff acknowledges, some forms of malic acid are naturally derived and are generally regarded as safe by the FDA. But the plaintiff contends that the defendant uses DL-malic acid, an artificial derivative, to impart a tantalizing tart flavor in its drinks rather than using the pricier natural alternative. Accordingly, the plaintiff—a Washington resident—brings suit on behalf of herself and a nationwide class of consumers, while also purporting to bring suit on behalf of a California subclass of residents (not her home state). She seeks to recover for statutory violations of Washington and California state consumer protection laws, as well as common-law violations for alleged breaches of express and implied warranty, negligent misrepresentation, and fraud.

Less Protein, Mo' Problems for Plant-Based-Meat Manufacturer

Yoon v. Beyond Meat Inc., No. 3:22-cv-00855 (S.D. Cal. Jun. 10, 2022).
Ramirez v. Beyond Meat Inc., No. 2:22-cv-04404 (C.D. Cal. Jun. 28, 2022).
Deloss v. Beyond Meat Inc., No. 2:22-cv-04405 (C.D. Cal. Jun. 28, 2022).

A plant-based-meat manufacturer faces three putative class actions in California federal courts for allegedly overstating the amount of protein in its plant-based products while relying on advertising materials that promote the products' "equal or superior protein" content to real meat. According to the plaintiffs, one product at issue claims to provide 20 grams of protein per serving and 40% of the protein Daily Value. But independent testing conducted by the plaintiffs in two of the three suits apparently revealed otherwise, finding the same product contained only 18 grams of protein per serving with an actual daily protein value of around 35%. The problem, according to the plaintiffs, is that the labels mislead consumers into believing the plant-based products contain more protein than they actually do.

One of the three suits raises an additional problem with the defendant's plant-based products, alleging that the defendant previously misrepresented its products as being "all-natural," "organic," or containing no "synthetic" ingredients, despite containing the synthetically produced ingredient methylcellulose. The complaint admits that the defendant has since "backtrack[ed]" on these claims and now discloses the methylcellulose ingredient. But that's not enough for these plaintiffs who are holding onto their false-labeling claims.

Together, the three suits seek certification of classes of purchasers in Illinois, California, New York, and Massachusetts. One suit also asserts claims for breach of warranty, fraud, and negligent misrepresentation, while the other two stick to asserting claims for violations of state consumer protection statutes and violation of the Magnuson–Moss Warranty Act.

Has Plaintiff Found the Formula for Success or Is She Just Kidding Herself in Toddler Drink Case?

Garza v. Gerber Products Company, No. 1:22-cv-03098 (N.D. Ill. Jun. 14, 2022).

In this putative class action, the plaintiff takes on a category of products marketed to children between 12 and 36 months old known as "transition formulas" or "toddler milks." According to the complaint, the rate of breastfeeding has increased significantly over the past two decades, resulting in a decrease in sales of infant formula—an accepted alternative when breastfeeding is not an option for children zero to 12 months old. Baby food manufacturers have allegedly turned to transition formulas to make up for the lost sales. The plaintiff claims that these transition formulas are not nutritionally appropriate, but they are misleadingly marketed as the "next step" in the progression from infant formula.

The plaintiff is represented by the prolific Spencer Sheehan. One problem Sheehan will face? A judge from the S.D.N.Y. dismissed similar claims against a private-label transition formula earlier this year, finding, among other things, that the plaintiff in that case had failed to identify any specific misleading advertisement or statement and instead argued the transition formula industry as a whole deceived consumers. If the court here follows the reasoning of that earlier opinion, this could be a case of the "terrible twos" for Sheehan.

Dismissals

Fudged Lawsuit Not for Everyone

Reinitz v. Kellogg Sales Co., No. 1:21-cv-01239 (C.D. Ill. Jun. 2, 2022).

This Illinois plaintiff was not in for a treat when her putative class action against a beloved breakfast treat that one can "pop" into a toaster was dismissed. This consumer claimed that the fudge-flavored tarts she purchased were falsely labeled in violation of the Illinois Consumer Fraud Act, the Iowa and Arkansas consumer fraud acts, state warranties of merchantability, state fraud-based claims, and the Magnuson–Moss Warranty Act because they "lack[ed] ingredients essential to fudge—butter and milk." Critically, the court concluded that "Whether or not experts agree, Plaintiff fails to support that the average consumer would believe a fudge product must, of necessity, contain milkfat."

The court reviewed Molly Mills's tome, *Come Get Your Fudge: 40 Tasty and Creative Fudge Recipes for Everyone*, which was relied on in the complaint as an expert source of what really constitutes fudge, and noted that not all the fudge recipes required butter and milk. This ruling follows immediately on the heels of *Harris v. Kellogg Sales Co.*, No. 3:21-cv-01040 (S.D. Ill. May 24, 2022), which dismissed with prejudice the claim that Strawberry Pop-Tarts had an insufficient amount of strawberry and that the description and picture on the label were misleading. *Harris* seemed to sway the court. The court also rejected the plaintiff's attempt to distinguish fudge products from vanilla-flavored products, which have recently been subject of a judicial dismiss-a-thon: "Plaintiff offers the undeveloped argument that vanilla is a flavor designator not an ingredient, while fudge is an ingredient, not a flavor. It is clear that vanilla can be both a flavor and an ingredient and Plaintiff does not support that the same cannot be said of fudge." The lawsuit was toasted—all claims were dismissed, though with leave to amend. Exactly one week after the court's ruling, Sheehan & Associates voluntarily dismissed the case.

Trials

Jury Cracks Joint Drink Manufacturer with $1.49 Million Verdict

Montera v. Premier Nutrition Corp., No. 3:16-cv-06980 (N.D. Cal. Jun. 7, 2022).

A federal jury in California recently returned a unanimous verdict in favor of a certified class of New York consumers pursuing claims against the manufacturer of a glucosamine-based beverage that purported to provide health benefits to drinker's joints. After a weeklong trial, the jury stretched its legs and delivered a quick verdict, finding the defendant liable for violating multiple provisions of the New York General Business Law and awarding $1.49 million in actual damages for over 166,000 total units of the product sold between 2013 and 2021.

The underlying complaint was originally filed in December 2016 and alleged, among other things, that the defendant falsely advertised its product as providing drinkers significant health benefits when it did not. The complaint alleged that outside the purported health benefits, there was no reason for consumers to purchase the joint drink and that the defendant profited immensely off its false and deceptive advertising scheme. The consumer class was originally certified in December 2019, but now that the class has been awarded a verdict by the jury, the defendant has moved to decertify.

Appeals

Sons of Canarchy? Beerstorming Fifth Circuit Motors on with Textualist-Heavy Opinion

CANarchy Craft Brewery Collective LLC v. Texas Alcoholic Beverage Commission, No. 21-50195 (5th Cir. June 20, 2022).

If you're a fan of puns, you're obviously indulging in the right publication. But if this digest leaves you yearning for even more pun-filled hoppiness, turn no further than the Fifth Circuit's recent opinion stemming from a cease and desist order issued by the Texas Alcoholic Beverage Commission. This high-gravity opinion hits you with puns harder than a triple IPA. It's bold, assertive, and bursting with spicy flavor and aromas that highlight complex word play in (ironically) a textualist opinion. This final draught from the Fifth Circuit will not leave you pining for lost time chuckling at a lawsuit over the statutory meaning of "owned."

The Texas Alcoholic Beverage Commission left a sobering message for our heroes, a hop-headed collective of breweries: a cease and desist order that the collective violated a Texas law allowing only smaller breweries to sell grab-and-go products direct to consumers (a rare exception to the so-called "three-tier" system that keeps manufacturers, distributors, and retailers in their lanes). The collective filed suit, seeking a declaratory judgment that the statute—whose limits are set by the number of barrels at "premises wholly or partly *owned*"—does not apply to *leased* premises, where 96% of the collective's brew sat. The Fifth Circuit raised its glass to the brewery collective, reasoning that it's the Texas legislature's craft to create carefully crafted canon. In other words, the legislature knew what it was doing when it enacted "owned" and not leased. So, to quote the opinion, "Party on."

Settlements

Motion for Preliminary Approval of Class Settlement

Cliff Averted?

Milan v. Clif Bar & Co., No. 3:18-cv-02354 (N.D. Cal. Jun. 23, 2022).

The parties in this class action hope to avoid the cliff ahead—rife with even more litigation—by proposing to settle a suit initially filed in 2018. The suit alleges that the defendant labeled bars with health and wellness claims that were misleading given their sugar content. Specifically, the plaintiffs attack the marketing of bars with various claims, such as "Nutritious," providing "Nutrition for Sustained Energy," and "Nourishing Kids in Motion" as false and misleading because the products are actually high in sugar. Under the proposed settlement, the defendant agrees to a $10.5 million non-reversionary settlement fund and agrees to make labeling changes if added sugars constitute 10% or more of the bar's calories. Under the proposed settlement, the defendant will also cease use of labeling that includes references to "Nutrition," "Nutritious," and "Nourishing Kids in Motion."

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